Supreme Court, U.S.
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No. 87-280

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

HARRY PLUMMER,

*Petitioner*,

—vs.—

LEDERLE LABORATORIES, DIVISION OF AMERICAN CYANAMID COMPANY,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the Second Circuit Court of Appeals violate petitioner's right to trial by jury in a products liability action in federal court on diversity of citizenship jurisdiction when the court determined that judgment notwithstanding the verdict should be entered because respondent's warnings were adequate as a matter of law and, alternatively, because petitioner failed to sustain his burden of going forward on the issue of proximate causation?

## PARTIES TO THE PROCEEDINGS

Respondent Lederle Laboratories is an unincorporated division of American Cyanamid Company.*

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* Pursuant to Rule 28.1 of the Rules of this Court, American Cyanamid Company states that it is associated with CYRO Industries, a partnership owned by subsidiaries of American Cyanamid Company and Rohm GmbH.

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## RESPONDENT'S BRIEF IN OPPOSITION

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This brief is submitted on behalf of respondent Lederle Laboratories, Division of American Cyanamid Company, in opposition to petitioner Harry Plummer's request for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The request raises no issue worthy of this Court's consideration, and, for the reasons stated below, should be denied.

## STATEMENT OF THE CASE

The proceedings in the district court and the court of appeals are not completely or accurately described in the petition. Accordingly, this Court is respectfully referred to the discussion of the facts and prior proceedings included in the opinion of the Second Circuit, which is included as Appendix B to the petition.

## REASONS FOR DENYING THE WRIT

Petitioner's request for review by writ of certiorari of the Second Circuit's decision should be denied because none of the requisite special and important reasons for review by this Court is presented. The Second Circuit's decision raises none of the considerations set forth in Rule 17 of the Rules of this Court but does present several additional considerations which confirm that the petition should not be granted.

### 1. The Petition Ignores the Presence of an Independent, Non-Federal Ground Adequate to Sustain the Second Circuit's Judgment.

This Court will not exercise its jurisdiction when a judgment rests on an independent and adequate non-federal ground. *See Jankovich v. Toll Road Commission*, 379 U.S. 487, 489 (1985) (appellate jurisdiction failed because of independent non-federal ground adequate to support the judgment); *Wilson v. Loew's Incorporated*, 355 U.S. 597 (1958) (writ dismissed as improvidently granted because judgment rested on adequate state ground). The Second Circuit's decision in this diversity action falls squarely within this rule.

The only question presented by the petition is whether the Second Circuit's decision that judgment notwithstanding the verdict should be entered because of petitioner's evidentiary failure on the issue of proximate causation somehow violated petitioner's Seventh Amendment right to a jury trial. Even if this issue were worthy of this Court's consideration, the case would not warrant review because the Second Circuit's holding on proximate cause was but one of two alternative grounds it found for reversing the district court's judgment. As the Second Circuit's decision plainly demonstrates, before reaching the proximate cause issue, the court first decided that respondent was not liable to petitioner because, under California law, respondent's warnings of the risks associated with the oral polio vaccine were adequate as a matter of law. That holding was premised not on an evidentiary review, but rather

on the Second Circuit's reading of settled California law defining a drug manufacturer's duty to warn and its view that California would decline to expand that duty in the manner urged by petitioner. "In short, judgment notwithstanding the verdict should have been directed since there is no duty under California law to specify precautions in the prescription drug context." Opinion (Appendix B to the Petition), at 23a. The petition before this Court does not mention this independent, non-federal ground for the court's decision, much less attack it as an error of such proportion as to require review by this Court.

**2. The Question Presented Raises Only an Evidentiary Issue in an Individualized Products Liability Case.**

Review on writ of certiorari also should be denied because the issue presented by the petition would require this Court to review factual evidence. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). A review of the record would be required because the petition creates a "constitutional" issue only by assuming that evidence in the record supported the jury's finding on proximate causation. That assumption, however, completely avoids the evidentiary controversy that was at the heart of the appeal to the Second Circuit. In effect, the petition asks this Court to act as a second court of appeals, to review the same record presented to the court of appeals, and to determine whether it agrees with the court of appeals' conclusion that petitioner failed to sustain his burden of going forward on the proximate cause issue. The presentation of this kind of evidentiary issue as one warranting review has been repeatedly criticized in this Court. *See Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959) (Stewart, J., concurring); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 332 (1960) (Harlan, J., dissenting); *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 447 (1959) (Frankfurter, J., dissenting). As Justice Stewart noted, "to review individualized personal injury cases, in which the sole issue is sufficiency of

the evidence, seems . . . not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here." *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. at 111. That teaching applies with equal force in this case.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
September 18, 1987

Respectfully submitted,

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